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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1958.

No. 618.

UNITED STATES LINES COMPANY,

Petitioner,

against

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondent.

REPLY BRIEF OF PETITIONER UNITED STATES LINES COMPANY.

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In its brief in opposition to the petition for a writ of certiorari, respondent states at page 4:

> "* * * At the time petitioner was brought into this action plaintiff had the right to sue petitioner and respondent claimed no greater right than that. The only issue on appeal was whether respondent was precluded from doing this because it had not paid the claim to plaintiff. * * *"

The question, properly put, would be whether respondent was a real party in interest, which it was not, and whether Rule 14(a) could be invoked to deprive petitioner of the substantive right of time-bar when the plaintiff did not sue petitioner within one year as required by contract and statute. The petitioner also argued before the Court of Appeals that as the plaintiff was time-barred the respondent was likewise time-barred. Petitioner relied and still relies on the basic law of subrogation, viz., that subrogation does not occur until payment and, at that time only,

the subrogee succeeds to whatever rights the subrogor had, subject to all defenses assertable against the subrogor. In this case, the respondent claiming the rights of a subrogee has not yet paid the plaintiff and, in fact is contesting liability to him. Therefore, subrogation has not yet occurred. The plaintiff has not sued the petitioner and is now time-barred. Consequently, all that this respondent may ever succeed to will be a time-barred claim. Therefore, respondent is clearly asserting a greater right than that possessed by plaintiff.

In none of the cases cited by respondent was the question of time-bar involved. Therefore, it is clear that these cases are not here controlling. Furthermore, all of the quotations from these cases at pages 5, 6, 7 and 8 of respondent's brief substantiate petitioner's position that Rule 14(a) does not accelerate the occurrence of subrogation. They clearly support the proposition that, even in the area of third-party practice subrogation does not occur until payment.

At pages 8 and 9 of respondent's brief the following statement is made:

> "• • • What petitioner is really contending is that it was deprived of a possible defense when suit was brought against it within the year. Is this depriving the petitioner of a substantive right? The same argument could be used in every third-party action because by bringing the third-party into the suit it is depriving the third-party defendant of setting up some statute of limitations."

Respondent's assertion is clearly erroneous. In the areas of contribution and indemnity, for which petitioner contends Rule 14(a) was intended, there is no question of statute of limitations, since in these areas the statute of limitations does not even begin to run until the plaintiff has recovered from the third-party plaintiff. Indemnity

and contribution give rise to an independent cause of action, whereas, in the case of subrogation, the cause of action to which a subrogee may succeed is the very same one as that of his subrogor.

Respondent begs the question when it asserts that suit was brought against petitioner within one year. By whom? The respondent, which never has been a party in interest?

When petitioner made its motion for summary judgment on the ground of time-bar the one-year time-for-suit provided for in the contracts of carriage and the U. S. Carriage of Goods by Sea Act, 1936, had expired. No suit had been brought against it by the plaintiff or anyone possessing present rights to sue, within the one year. When plaintiff or anyone succeeding to his rights did not sue within the one year, plaintiff's cause of action was time-barred both in his hands and in the hands of anyone who might later succeed to it.

No dispute is made of the fact that Rule 14(a) was intended to avoid circuity and multiplicity of actions. In this case, there can be no such multiplicity or circuity of actions since the claim is time-barred and the defense of time-bar would be a valid defense to an independent suit.

Conclusion.

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Michael F. Whalen,
Counsel for Petitioner.

James McGarry
and
Kirlin, Campbell & Keating,
Of Counsel.

Dated: New York, N. Y.,
February 13, 1959.